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No. 87-1358

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARSHALL-SILVER CONSTRUCTION COMPANY, INC.,
AND
SILVER CONSTRUCTION, INC.,

Petitioners,

v.

M. MARK MENDEL, Individually
DANIEL E. MURRAY, Individually, and
M. MARK MENDEL, Limited,

Respondents.

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the decision by a unanimous panel of the Court of Appeals for the Third Circuit affirming the dismissal of a RICO claim which alleged only a single victim, a single injury, and a single, short-lived scheme with only a single active perpetrator mandates the issuance of a Writ of Certiorari?

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M. MARK MENDEL, Individually
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Respondents.

BRIEF IN OPPOSITION

Respondents M. Mark Mendel, Daniel E. Murray and M. Mark Mendel, Ltd.[1] respectfully request that the Court deny Petitioners' request for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the unanimous panel of the Court of Appeals for the Third Circuit is reported at 835 F.2d 63 (3d Cir. 1987), and the slip opinion is reprinted in the Petition Appendix. The District Court's bench ruling and Order are not reported but are included in the Petition Appendix.

[1] Pursuant to Rule 28.1, defendants state that M. Mark Mendel, Ltd. is the only corporate respondent. M. Mark Mendel, Ltd. has no parent companies, subsidiaries or affiliates.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 9, 1987, and a petition for rehearing *en banc* was denied on January 5, 1988. This Court has jurisdiction to hear the Petition pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Organized Crime Control Act of 1970, Title IX (Racketeer Influenced and Corrupt Organizations), 18 U.S.C. §§1961-1968, as amended (RICO).

The relevant sections of this statute are set forth in the Petition.

STATEMENT OF THE CASE

This action arises from the failed business of petitioners Marshall-Silver Construction Company, Inc. ("Marshall-Silver") and Silver Construction Inc. ("Silver Construction") (¶16).[2] Respondents, M. Mark Mendel and Daniel E. Murray are lawyers admitted to practice in Pennsylvania and employees of respondent M. Mark Mendel, Ltd., a Philadelphia lawfirm.[3]

From 1983 to 1984, Marshall-Silver was in business as a general contractor for construction projects (¶¶16, 18). Defendants' client, Barton & Co. ("Barton") was a subcontractor on several of Marshall-Silver's projects (¶21). During 1984 several disputes arose between Marshall-Silver and Barton relating to Marshall-Silver's refusal to pay Barton for completed work (Exhibits "A" and "B" to the Complaint; *see* App. at A-14, A-20).[4] After a June 29, 1984 meeting (¶24), Mr. Mendel wrote strongly worded demand letters dated July 2 and 3, 1984, demanding on behalf of his client Barton

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[2] Paragraph references are to the complaint.

[3] For referencing ease the parties are referred to hereafter in their respective positions below; petitioners as plaintiffs and respondents as defendants.

[4] Also in 1984, Marshall-Silver changed its name to Silver Construction, and then later changed it back to Marshall-Silver after a new corporation, also known as Silver Construction Inc., had been formed (¶16). Marc I. Silver, a plaintiff in a related lawsuit was the sole owner of both corporations. *See infra* notes 9 and 10.

that Marshall-Silver pay Barton (Exhibits "A" and "B" to the complaint, *see* App. at A-14, A-20).[5] Approximately six months later when Marshall-Silver still had not paid Barton, defendants, on behalf of Barton and two other Marshall-Silver creditors, filed a Petition for Involuntary Bankruptcy against Marshall-Silver in the United States Bankruptcy Court for the Eastern District of Pennsylvania on December 28, 1984 (¶¶37, 39; *see* App. at A-22).[6] The Bankruptcy Court set bonds on the petition totalling $850,000 (¶42). The petition was dismissed on February 8, 1985, after the petitioning creditors did not post the bonds (¶43).

After the petition was dismissed, Marshall-Silver filed a complaint against Barton and the other petitioning creditors in Bankruptcy Court, (the "Bankruptcy Complaint"), pursuant to 28 U.S.C. §§157, 1334 and Section 303(i) of the Bankruptcy Code, 11 U.S.C. §303(i) (Bankruptcy Complaint ¶5). The conduct and injuries alleged, and damages sought in the complaint dismissed in this action are virtually identical to those alleged in the Bankruptcy Complaint.[7] The bankruptcy case has been tried and is pending disposition.[8]

While the bankruptcy action was pending, plaintiffs filed this lawsuit charging defendants with violations of RICO and various state laws.[9] On defendants' motion, the District Court dismissed

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[5] Plaintiffs did not allege any injury resulting from the demand letters.

[6] The filing of the bankruptcy petition, along with the resultant publicity in the trade, was the only act of defendants alleged to have caused plaintiffs any harm. (¶¶37, 44-46, 59, 63, 65).

[7] *Compare* ¶¶66, 69, 37, *with* Bankruptcy Complaint ¶¶28, 49, 60; *and* ¶¶37, 46, 57(3), 63, *with* Bankruptcy Complaint ¶¶27(c), 47(c), 41, 40, 42, 27(a), 47(a), 27(b), 47(b); *and* ¶46, *with* Bankruptcy Complaint ¶¶40-41.

[8] The bankruptcy action, captioned *Marshall-Silver Construction Company, Inc. v. Barton & Co., Nester Brothers, Inc., R.J. Skelding Co., Inc.*, No. 85-0300 (Bankr. E.D. Pa.) was tried in the United States Bankruptcy Court for the Eastern District of Pennsylvania before the Honorable Emil P. Goldhaber. All parties submitted proposed findings of fact and conclusions of law. Judge Goldhaber retired from the bench without ruling.

[9] Jurisdiction in this action was founded solely on federal question jurisdiction premised on the RICO claim. A virtually identical complaint to the one dismissed and appealed here was filed by plaintiffs' principal, Marc I. Silver, individually, and is pending before the United States District Court for the Eastern District of Pennsylvania under the caption *Marc I. Silver v. M. Mark Mendel, Daniel E. Murray, and M. Mark Mendel, Ltd.*, Civil Action No. 86-7104 (E.D. Pa.) (the "*Silver* action"). In addition to RICO, jurisdiction in the *Silver* action is premised

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plaintiffs' RICO claim and dismissed plaintiffs' pendent state law claims without prejudice for plaintiffs to bring them in a proper forum.

A unanimous panel of the Court of Appeals for the Third Circuit affirmed, holding that plaintiffs' allegations of "a single victim,[10] a single injury, and a single, short-lived scheme with only two active perpetrators,"[11] did not constitute a pattern of racketeering.[12] *Marshall-Silver Construction Co. v. Mendel*, 835 F.2d 63, 67 (3d Cir. 1987). Plaintiffs' petition for rehearing *en banc* was denied.

ARGUMENT

Plaintiffs urge the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to address a conflict among the courts of appeals in interpreting the requirement of a "pattern of racketeering activity" under RICO, 18 U.S.C. §1962(c). This case is ill-suited for resolving the pattern question, however, because none of the various approaches of the courts of appeals would find a RICO pattern based on plaintiffs' allegations of a single victim, a single injury, and a single, short-lived scheme with

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on diversity of citizenship. The RICO claim and several state law claims in the *Silver* action were dismissed on the merits, and that action is awaiting trial in district court on plaintiffs' state law claim of wrongful use of civil proceeding.

[10] Marc I. Silver was the principal and/or sole owner of both Marshall-Silver and Silver Construction. (¶24; *Silver* action complaint ¶16). Moreover, the complaint does not allege any action taken by defendants with respect to Silver Construction, or any injury suffered by Silver Construction. Thus, the complaint alleges a single victim—Marshall-Silver.

[11] The Mendel lawfirm was alleged to have participated in the affairs of Barton only through the activities of Messrs. Mendel and Murray. *See Marshall-Silver Construction Co. v. Mendel*, 835 F.2d 63, 67 n.4 (3d Cir. 1987). Similarly, the only substantive allegation against defendant Murray was that he signed the Petition for Involuntary Bankruptcy (¶¶37, 39). This solitary allegation of a single predicate act cannot support a RICO claim against Mr. Murray. Thus, the complaint alleged only a single active perpetrator.

[12] Plaintiffs place great emphasis on their "offer" to amend the complaint; an issue that never was properly before either the District Court or the Court of Appeals. Plaintiffs never filed a motion seeking leave to amend. Moreover, as is discussed below, *see infra* note 27, the new allegations offered by plaintiffs add nothing to their RICO claim.

only a single active perpetrator.[13] Every court of appeals that has rendered an opinion on the factors which satisfy the elements of a RICO claim would dismiss this case because plaintiffs' allegations fail to meet its standards. The Writ, therefore, should be denied because this case does not hone the issue sufficiently for meaningful resolution by the Court.

A. *The "Pattern" Requirement*

RICO provides a private civil right of action to "any person injured in his business or property. . . ." 18 U.S.C. §1964(c). Plaintiffs' complaint purported to allege a RICO claim pursuant to 18 U.S.C. §1962(c) (¶83), which renders unlawful the conduct of an enterprise through a "pattern of racketeering activity." A "'pattern of racketeering activity' requires at least two acts of racketeering activity. . . ." 18 U.S.C. §1961(5). In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), this Court explained that the definition contained in section 1961(5) "states that a pattern '*requires* at least two acts of racketeering activity'. . . not that it 'means' two such acts." *Id.* at 496 n.14 (emphasis in original).

> The implication is that while two acts are necessary, they may not be sufficient. Indeed, in common parlance two of anything do not generally form a "pattern."

Id. The Court then challenged the lower courts and Congress "to develop a meaningful concept of 'pattern'" to combat "the 'extraordinary' uses to which civil RICO has been put." *Id.* at 500.

Towards this end the Court offered the following guidance: "The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern." *Id.* at 496 n.14.

Among the sources the Court looked to was the Senate Report emphasizing that RICO: 1) was not directed at sporadic activity; 2) required a threat of continuing activity to be triggered; and 3) required continuity plus relationship to satisfy the pattern requirement.

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[13] Moreover, although different courts of appeals historically have adopted varied and sometimes conflicting approaches to pattern, a consensus is emerging among the courts of appeals that adopts a case-by-case analysis of a variety of factors to determine whether the conduct alleged constitutes a pattern of racketeering activity.

> As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." S. Rep. No. 91-617, p. 158 (1969)(emphasis added).

Id.

The Court also found instructive the statements of Representative Poff that RICO is "not aimed at the isolated offender," and Senator McClellan, the sponsor of the Senate bill, that "pattern" requires relationship among the acts and two acts standing alone are insufficient.

> Similarly, the sponsor of the Senate bill, after quoting this portion of the Report, pointed out to his colleagues that "[t]he term 'pattern' itself requires the showing of a relationship. . . . So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . ." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See also *id.*, at 35193 (statement of Rep. Poff) (RICO "not aimed at the isolated offender"); House Hearings, at 665.

Id.

The Court also directed attention to the definition of "pattern" given in a later section of the same bill. This definition requires that the acts have the same or similar: 1) purposes, 2) results, 3) participants, 4) victims, 5) methods of commission, or 6) otherwise are interrelated and 7) are not isolated events.

> Significantly, in defining "pattern" in a later provision of the same bill, Congress was more enlightening: "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. §3575(e). This language may be useful in interpreting other sections of the Act.

Id. (citation omitted).

Since *Sedima*, the courts have taken up the cudgel of fashioning a meaningful concept of "pattern."[14] Eleven courts of appeals have addressed the issue.[15]

B. *The Writ Should Be Denied Because Plaintiffs' RICO Claim Would Fail Under Any of the Courts of Appeals' Approaches to Pattern*

In analyzing "pattern" the courts have focused on *Sedima*'s emphasis of "continuity plus relationship." Although different courts of appeals evaluate different factors and weigh them differently, the consensus emerging from the eight courts of appeals for the First, Third, Fourth, Seventh, Ninth, Tenth, Eleventh, and the District of Columbia Circuits eschews any litmus test measure of pattern in favor of a case-by-case factual analysis of many factors to determine continuity plus relationship.[16] These factors include: the number, character, and variety of the predicate acts; whether the predicate

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[14] Congress also has carried the torch. In the 99th Congress H.R. 5445, which passed the House of Representatives by a vote of 371 to 28, *United States House of Representatives Legislative Calendar, Committee on the Judiciary*, 99th Cong., 1st Sess. 205 (1986), would have amended section 1962(c) and legislatively defined pattern to require multiple, divisible criminal episodes. Although this bill ultimately died in the Senate Judiciary Committee, H.R. 3240 which currently is before Congress incorporates this idea and would amend section 1961(6) to define pattern as requiring that the predicate acts not be "so closely related to each other and connected in point of time and place that the acts constitute a single episode involving only one victim. ... ."

Also pending in this 100th Congress are H.R. 2983 and parallel S. 1523. These bills would amend section 1964(c) to curtail substantially the availability of a private right of action under RICO.

Thus, Congress is working on the very legislative question that plaintiffs suggest the Court resolve judicially, and Congress has proposed resolutions very different from that urged by plaintiffs.

[15] The Court of Appeals for the Sixth Circuit has not addressed the pattern question since *Sedima* was decided.

[16] *First Circuit. See Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 31 (1st Cir. 1987) ("no one characteristic can be considered as controlling in determining whether a pattern exists").

Third Circuit. See, e.g., Marshall-Silver Construction Co. v. Mendel, 835 F.2d 63, 66 (3d Cir. 1987) (discussing factors relevant to case-by-case analysis); *Barticheck v. Fidelity Union Bank*, 832 F.2d 36, 40 (3d Cir. 1987) ("We decline to adopt a verbal formula for determining when unlawful activity is sufficiently extensive to be 'continuous.' This determination necessarily depends on the circumstances of the particular case.")

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acts were in pursuit of a single objective or multiple objectives; the time period over which the acts were committed; the similarity of the acts; the number of victims; the number of perpetrators; the number of injuries; the context in which the acts were committed; the presence of separate schemes; whether the scheme was open-ended; and whether the acts were discrete or merely preparatory to a single offense.

Although the Court of Appeals for the Second, Fifth and Eighth Circuits have not formally adopted this consensus approach, the Court of Appeals for the Second Circuit gives consideration to these same factors in its analysis of "enterprise" under RICO, the Court of Appeals for the Fifth Circuit has reconsidered its approach, and even plaintiffs concede that this case would fail to meet the criteria of "pattern" adopted by the Court of Appeals for the Eighth Circuit. Plaintiffs' allegations of a single victim, single injury, and a single, short-lived scheme with only a single active perpetrator, therefore,

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Fourth Circuit. See, e.g., Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc., 831 F.2d 488, 492 (4th Cir. 1987) (no mechanical test can determine the existence of a RICO pattern; the question necessarily is a matter of criminal dimension and degree to be decided on a case-by-case basis); *HMK Corp. v. Walsey*, 828 F.2d 1071, 1073 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 706 (1988) (case-by-case standard looking to criminal dimension and degree).

Seventh Circuit. See, e.g., Liquid Air Corp. v. Rogers, 832 F.2d 1297, 1304 (7th Cir. 1987) ("fact-specific inquiry, in which no single factor" determinative); *Marshall & Ilsley Trust Co. v. Pate*, 819 F.2d 806, 809-10 (7th Cir. 1987) (existence of pattern "fact specific question encompassing many relevant factors").

Ninth Circuit. See, e.g., Medallion Television Enterprises, Inc. v. SelecTV of California, Inc., 833 F.2d 1360, 1363 (9th Cir. 1987) ("The circumstances of the case. . . must suggest that the predicate acts are indicative of a threat of continuing activity"); *Sun Savings & Loan Association v. Dierdorff*, 825 F.2d 187, 194 (9th Cir. 1987) (examine predicate acts to see whether isolated or sporadic).

Tenth Circuit. See, e.g., Torwest DBC, Inc. v. Dick, 810 F.2d 925, 929 (10th Cir. 1987) ("we decline to go beyond the facts before us to formulate a bright-line test in the abstract").

Eleventh Circuit. See Bank of America National Trust & Savings Association v. Touche Ross & Co., 782 F.2d 966, 971 (11th Cir. 1986) (analyzing number and type of acts, parties, time period, and purposes).

District of Columbia Circuit. See Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, No. 86-5135 (D.C. Cir. February 12, 1988) (available on LEXIS) (analyzing number of acts, victims and perpetrators, type of acts, time period and goal).

would fail to establish a pattern under the approaches of each of the eleven courts of appeals that have addressed the question.

1. *The Consensus Courts*

Although the eight courts of appeals that utilize a case-by-case factual analysis of pattern vary in the weight they give to specific factors, plaintiffs' allegations would not establish a pattern under any approach.

First Circuit. In *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22 (lst Cir. 1987), the Court of Appeals for the First Circuit held that racketeering acts "do not constitute a pattern simply because they number two or more. The constituent elements must be sufficiently related to one another and threaten to be more than an isolated occurrence." *Id.* at 30. Applying this standard the Court found that a single bribe paid in three installments and which involved eleven telephone calls and eight letters did not constitute a pattern of racketeering activity. *Id.* at 31. Similarly, here plaintiffs' allegations of two letters, a single meeting and the filing of a single pleading, all with the single alleged purpose of putting Marshall-Silver out of business would not constitute a pattern of racketeering activity under the approach of the Court of Appeals for the First Circuit.

Third Circuit. The Court of Appeals for the Third Circuit analyzes pattern by evaluating such factors as: 1) the number of unlawful acts, 2) the length of time over which the acts were committed, 3) the similarity of the acts, 4) the number of victims, 5) the number of perpetrators, and 6) the character of the unlawful activity. *Marshall-Silver Construction Co. v. Mendel*, 835 F.2d 63, 66 (3d Cir. 1987); *Barticheck v. Fidelity Union Bank*, 832 F.2d 36, 39 (3d Cir. 1987). *See Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1355 (3d Cir. 1987). Applying this analysis to this case the Court held that plaintiffs' allegations of "a single victim, a single injury, and a single, short-lived scheme with only two active perpetrators,"[17] *Mendel*, 835 F.2d at 67, failed to establish a pattern of racketeering activity. *Id.*[18]

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[17] *See supra* note 11.

[18] Plaintiffs erroneously suggest that the Court of Appeals' decision in *Mendel* is inconsistent with decisions of other panels of that Court. Not only would such an intramural conflict be an insufficient basis for granting the Writ, *see Davis v. United States*, 417 U.S. 333, 340 (1974), but no such conflict exists.

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Fourth Circuit. The Court of Appeals for the Fourth Circuit has adopted a pattern analysis that inquires into "criminal dimension and degree." *International Data Bank Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987). Under this analysis "the predicate acts must be related and must be part of a continuous criminal endeavor." *Id.* at 154. In *Zepkin*, the Court of Appeals found that:

> There must be some indication of a "threat of continuing activity" by the defendants, not just one instance of fraud with a single victim.

Id. at 155 (quoting *Lipin Enterprises v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986)). Here plaintiffs alleged no more than

> a single, non-recurring scheme to defraud a single entity. . . in a quite narrow business context. There is no inference that the scheme embodies a threat of continued like activity in the future. Just as the scheme alleged in *Zepkin* was found wanting in the required degree of continuity of conduct, so is that here. The complaint fails to allege a RICO pattern of racketeering activity.

Eastern Publishing & Advertising, Inc. v. Chesapeake Publishing & Advertising, Inc., 831 F.2d 488, 492 (4th Cir. 1987).[19] Here again, plaintiffs' allegations of a single scheme, over a short period of time,

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Given the factors that the Court considers it is not surprising that it found that plaintiffs' allegations here of a single victim, a single injury, and a single, short-lived scheme with only one active perpetrator did not constitute a pattern, while finding in other cases: fraud by several individuals and two separate entities in marketing oil and gas limited partnerships, involving repetition of similar misrepresentations to more than twenty investors and considerably more than two acts of mail fraud did constitute a pattern, *Barlicheck*, 832 F.2d at 39; four people acting in concert over a long period of time, participating in two separate schemes to bribe city officials, and paying the bribes in multiple installments to assure that the municipal decisional process was corrupted at every stage, satisfied the pattern requirement, *Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3d Cir. 1987); or defrauding numerous persons with respect to materials and services for eighty oil wells owned by nineteen parties and serviced by a twentieth, over a period of eleven months as part of work done under two separate contracts pertaining to different time periods constituted a RICO pattern. *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1355 (3d Cir. 1987).

[19] *See also HMK Corp. v. Walsey*, 828 F.2d 1071 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 706 (1988) (no pattern in single scheme extending more than four years and involving numerous predicate acts aimed at corrupting political processes to gain competitively advantageous zoning and condemnation rulings).

with a single perpetrator and a single victim also would fail to pass muster as a RICO claim under the test of the Court of Appeals for the Fourth Circuit.

Seventh Circuit. In *Morgan v. Bank of Waukegan*, 804 F.2d 970 (7th Cir. 1986), the Court of Appeals for the Seventh Circuit held that an ongoing fraudulent scheme to defraud investors spanning approximately four years, involving several acts of mail fraud relating to two separate foreclosure sales occurring two years apart and others relating to the initial loan transaction, satisfied RICO's pattern requirement. *Id.* at 976. The Court adopted a case-by-case approach holding that a pattern required that the predicate acts "be ongoing over an identified period of time so that they can fairly be viewed as constituting separate transactions, *i.e.*, 'transactions "somewhat separated in time and place." ' " *Id.* at 975 (citations omitted). Factors to be considered in the pattern analysis "include the number and variety of predicate acts and the length of time over which they were committed, the number of victims, the presence of separate schemes and the occurrence of distinct injuries." *Id.* Using the analysis employed in the Seventh Circuit, plaintiffs' allegations here of a single victim, a single injury, and a single, short-lived scheme with only one active perpetrator, would fail to constitute a pattern.[20] *See Marks v. Pannell Kerr Forster*, 811 F.2d 1108 (7th

[20] Plaintiffs erroneously suggest that the Court of Appeals for the Seventh Circuit may be shifting away from the analysis enunciated in *Morgan*. The Court of Appeals for the Seventh Circuit, however, consistently has followed *Morgan* using its case-by-case analysis and looking at the factors discussed in *Morgan*. *See, e.g., Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1304-05 (7th Cir. 1987) (nineteen separate acts resulting in repeated infliction of distinct economic injuries sufficient to establish pattern); *Appley v. West*, 832 F.2d 1021, 1027-28 (7th Cir. 1987) (predicate acts causing discrete injuries sufficient for pattern); *Tellis v. United States Fidelity & Guaranty Co.*, 826 F.2d 477, 479 (7th Cir. 1986) (multiple predicate acts over a two month period, relating to same transaction, involving single victim, and inflicting single injury does not establish a pattern); *Marks v. Pannell Kerr Forster*, 811 F.2d 1108, 1112 (7th Cir. 1987) (mailing of false tax schedules to former partner on two occasions, filing false partnership tax returns, and denying former partner information and documents over a period of several months and relating to a single scheme to defraud a single victim in a "one-shot" effort to inflict a single injury do not comprise a pattern); *Elliott v. Chicago Motor Club Insurance*, 809 F.2d 347, 350 (7th Cir. 1986) (several acts of mail fraud over several years in furtherance of scheme to defraud five family members injured in car accident does not constitute pattern because all claims arose out of same accident and same insurance policy); *Lipin Enterprises, Inc. v. Lee*, 803 F.2d 322, 324 (7th Cir. 1986) (at least twelve separate acts of mail fraud relating to various items in sale of business not a pattern because all designed to defraud one victim on one occasion).

Cir. 1987); *Tellis v. United States Fidelity & Guaranty Co.*, 826 F.2d 477 (7th Cir. 1986).

Ninth Circuit. The Court of Appeals for the Ninth Circuit applies a case-by-case analysis of predicate acts to determine whether the acts were isolated or sporadic, *Sun Savings & Loan Association v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987), or whether there is a threat of continuing activity. *Medallion Television Enterprises, Inc. v. SelecTV of California, Inc.*, 833 F.2d 1360, 1364 (9th Cir. 1987). "[D]iscreet [sic] activity which has a distinct and easily defined beginning and end, even though supported by several alleged predicate acts of mail and wire fraud" does not constitute a pattern of racketeering. *Jarvis v. Regan*, 883 F.2d 149, 153 (9th Cir. 1987).

In *Schreiber Distributing Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986), the Court held that, as here, a single fraudulent purpose perpetrated on a single victim did not satisfy the pattern requirement. *Id.* at 1399. In *California Architectural Building Products v. Franciscan Ceramics, Inc.*, 818 F.2d 1466 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 698, 699 (1988) the Court described its holding in *Schreiber:*

> we held that plaintiffs failed to state a RICO claim by alleging acts of mail or wire fraud relating to the diversion of a single shipment of products. . . . That was a single fraud perpetrated on a single victim.

Id. at 1469 (citation omitted). Applying the standard of the Court of Appeals for the Ninth Circuit to the facts alleged by plaintiffs here: "This case involved but a single alleged fraud with a single victim." *SelecTV*, 833 F.2d at 1364. Therefore, as there was no threat of continuing activity, there was no pattern. *Id.* at 1363-64. Once again, the allegations here of a single short-lived scheme and a single victim would fail to measure up against the criteria established by the Court of Appeals for the Ninth Circuit.

Tenth Circuit. Although the Court of Appeals for the Tenth Circuit has not stated what is a RICO pattern, it has applied a case-by-case factual analysis to determine what is *not* a pattern. *Garbade v. Great Divide Mining and Milling Corp.*, 831 F.2d 212, 214 (10th

Cir. 1987).[21] The allegations of plaintiffs' complaint here fit well into the holdings of the Court of Appeals for the Tenth Circuit:

> A scheme to achieve a single discrete objective does not in and of itself create a threat of ongoing activity, even when that goal is pursued by multiple illegal acts, because the scheme ends when the purpose is accomplished.

Torwest, 810 F.2d at 928-29; *Garbade*, 831 F.2d 214. In *Torwest*, *Garbade* and here there is nothing from which there could be inferred a continuing scheme. The continuity element is absent here. Thus, plaintiffs allegations of a single objective to drive Marshall-Silver out of business over short duration with a single victim and a single perpetrator would not meet the pattern standard of the Court of Appeals for the Tenth Circuit.

Eleventh Circuit. Although the Court of Appeals for the Eleventh Circuit has not explicitly stated its pattern analysis, in *Bank of America National Trust and Savings Ass'n v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), the Court discussed the definition of pattern provided in 18 U.S.C. §3575(e) and analyzed the number and type of predicate acts, the scope and duration of the scheme, and the number and type of victims. Using this analysis, the Court held that nine separate acts of mail and wire fraud over three years, involving numerous false financial statements, inducing five banks to extend $60 million in credit to a firm on verge of bankruptcy, satisfied the pattern requirement. Applying this analysis to the complaint here, the single victim, single injury, and single, short-lived scheme with only one active perpetrator pled by plaintiffs does not constitute a pattern.

District of Columbia Circuit. Although the Court of Appeals for the District of Columbia Circuit has not faced the pattern question squarely, it recently discussed the pattern requirement. *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, No. 86-5135 (D.C. Cir. February 12, 1988) (available on LEXIS). In *Yellow Bus*, the trial court had dismissed the RICO claims prior to this Court's decision in *Sedima*. Although the discussion of pattern is fleeting (apparently the question of pattern was not raised by the parties in either the District Court or the Court of Appeals), the

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[21] *See Condict v. Condict*, 826 F.2d 923 (10th Cir. 1987); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925 (10th Cir. 1987).

Court looked to 18 U.S.C. §3575(e) for guidance and found that multiple perpetrators committing ten predicate acts of vandalism and intimidation against multiple victims, appeared to meet the pattern requirement. Again, plaintiffs' allegations of a single victim, single injury, and a single short-lived scheme with only one active perpetrator would fail to establish a pattern under this test.

2. *The Other Circuit Courts of Appeals*

Although the Courts of Appeals for the Second, Fifth and Eighth Circuits have not formally adopted the case-by-case factually oriented approach of the other courts of appeals, the Court of Appeals for the Second Circuit subsumes its inquiry of continuity plus relationship into its analysis of enterprise, and the Courts of Appeals for the Fifth and Eighth Circuits have expressed interest in abandoning their more rigid applications in favor of the consensus analysis. Even under their current formulations, however, each of these courts of appeals would find that plaintiffs' allegations are insufficient to establish a RICO pattern.

Second Circuit. Although plaintiffs' petition correctly cites the "pattern" test of the Court of Appeals for the Second Circuit and correctly notes that here substance is given to the continuity concept through the analysis of enterprise, plaintiffs leave the mistaken impression that the allegations here would meet the test in the Second Circuit.[22] The Court of Appeals for the Second Circuit gives content "to the factor of 'continuity plus relationship' discussed in *Sedima* through [its] interpretation of the 'enterprise' element of RICO, 18 U.S.C. §§1961(4), 1962(c)," *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 51 (2d Cir. 1987), *cert. denied*, 108 S. Ct. 698 (1988), recognizing that this departure is one of form not substance. *Id.; United States v. Ianniello*, 808 F.2d 184, 191 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987). In order to establish a RICO enterprise a plaintiff must prove that the associates function as a continuing operation and that the predicate acts are related to their common purpose. *Id.; Beck*, 820 F.2d at 51. *See also United States v. Benevento*, 836 F.2d 60, 72 (2d Cir. 1987).

> As *Ianniello* recognized, whether one looks for the requisite continuity and relatedness by examining the pattern or the enterprise is really a matter of form, not substance. . . . A

[22] Petition at 11-12 and n.7 and n.8.

> consequence of that observation for this case is that with the elimination of Phase I from consideration, the enterprise alleged by plaintiffs had but one straightforward, short-lived goal, the sale of the U.S. collateral at a reduced price. At the conclusion of the sale, the alleged enterprise ceased functioning.

Beck, 820 F.2d at 51 (citation omitted). Under the approach in the Second Circuit, therefore, where as here "the enterprise alleged by plaintiffs had but one straightforward, short-lived goal"—putting Marshall-Silver out of business—"[s]uch an association is not sufficiently continuing to constitute an 'enterprise'. . . ." *Beck*, 820 F.2d at 51. Thus, plaintiffs' RICO claim fails under the analysis used by the Court of Appeals for the Second Circuit.

Fifth Circuit. Plaintiffs argue that *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985), holding that two related predicate acts sufficed to allege a RICO claim, is "[t]he leading case" in the Fifth Circuit. Petition at 13. *R.A.G.S.*, however, does not present a viable conflict because it has been drained of its vitality by subsequent decisions of the Court of Appeals for the Fifth Circuit.

R.A.G.S. was decided within three months of *Sedima*, and completely ignored the continuity requirement of *Sedima*. Ever since *R.A.G.S.*, the Court of Appeals for the Fifth Circuit has been moving away from it. In *Smoky Greenhaw Cotton v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 785 F.2d 1274 (5th Cir.), *rehearing denied*, 785 F.2d 1282 (5th Cir. 1986), the Court of Appeals directed the trial court to consider carefully on remand the facts as developed with respect to the pattern requirement as enunciated by this Court in *Sedima*.

> In *Sedima*, however, the Supreme Court appeared to challenge the lower courts to develop a more rigorous interpretation of "pattern." 105 S. Ct. at 3285 n. 14, 3287, 87 L.Ed.2d at 358 n. 14, 361. Responding to or anticipating this challenge, a number of lower courts have rejected the earlier broad interpretations of pattern. . . . Given the present state of the record, we are not required to pass on this issue and express no opinion at this time. Should Greenhaw elect to

> retry the RICO claim, the District Court will have to consider carefully the meaning of the "pattern of racketeering activity" in the context of the facts actually developed.

Id. at 1280-81 n.7 (citations omitted).

Moreover, Judge Politz, a member of the *R.A.G.S.* panel, was a member of the panel in *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423 (5th Cir. 1987), one of two panels that urged that *R.A.G.S.* be overruled *en banc*,[23] and wrote the opinion for the Court in *Cowan v. Corley*, 814 F.2d 223 (5th Cir. 1987), one of two subsequent decisions that simply ignored *R.A.G.S.*[24] In *Cowan*, Judge Politz wrote:

> We read this language in *Sedima* to direct a narrower definition of pattern than had been sometimes employed. Consistent therewith, the district court correctly concluded that two illegal acts will not constitute a RICO pattern in every instance.

Id. at 227 (footnote omitted).

In *Montesano* the Court limited *R.A.G.S.* by applying the continuity analysis ignored in *R.A.G.S.* to the enterprise requirement.[25] *Montesano*, 818 F.2d at 426-27. In holding that an association in fact enterprise joined together to commit a discrete offense does not establish a RICO enterprise the Court noted: "Proof of a 'pattern of racketeering activity' does not necessarily establish an 'enterprise' because 'pattern' as defined by *R.A.G.S.* does not require this continuity." *Id.* at 427. Thus, these post-*R.A.G.S.* cases show a strong tilt away from the doctrinaire approach of *R.A.G.S.* and it would seem that plaintiffs' allegations here of a single, straightforward,

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[23] *See Montesano*, 818 F.2d at 426 (urging that *R.A.G.S. Couture* be replaced by a test that would recognize that a scheme to achieve a single discrete objective, even if pursued by multiple illegal acts does not constitute a pattern); *Croker v. Federal Deposit Insurance Corp.*, 826 F.2d 347, 348 n.2 (5th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3425 (December 1, 1987).

[24] *See Cowan*, 814 F.2d at 226-27. *Smoky Greenhaw Cotton*, 785 F.2d at 1280-81 n.7.

[25] This approach is similar to that of the Court of Appeals for the Second Circuit.

short-lived goal would fail to establish a RICO enterprise under the analysis of the Court of Appeals for the Fifth Circuit.[26]

Eighth Circuit. In *Superior Oil Co. v. Fulmer*, 785 F.2d 252, (8th Cir. 1986), the United States Court of Appeals for the Eighth Circuit held that continuity sufficient to establish a pattern required multiple criminal schemes or other criminal episodes. *Id.* at 257. The Court held that several related predicate acts committed over a substantial period of time did not constitute a pattern because "the record reveals one isolated fraudulent scheme." *Id.* Plaintiffs here in effect concede that their complaint alleging a single scheme to put Marshall-Silver out of business, does not satisfy the pattern test of the Court of Appeals for the Eighth Circuit.[27]

Although the Court of Appeals for the Eighth Circuit has adhered to its bright-line, multiple scheme requirement for pattern,[28] members of the Court recently have expressed an interest in reconsidering this test in light of the evolution of pattern in other courts of appeals. *See, e.g., H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648, 650, 651 (8th Cir. 1987) (McMillian, J., concurring and Gibson, J., concurring).

Thus, plaintiffs' allegations would fail under any of the approaches developed by the courts of appeals. The Writ should be denied,

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[26] Although not faced with the question in *Montesano*, the Court suggested that its continuity analysis would not apply where the enterprise alleged was a corporation. *Montesano*, 818 F.2d at 427. Although the enterprise here alleged is subject to much dispute, there is no reason to distinguish between association in fact enterprises and corporate enterprises. If the continuity analysis is to be conducted through the enterprise element of RICO, the proper inquiry is not whether the enterprise itself continues to exist, but rather whether the enterprise's unlawful activity continues.

[27] Plaintiffs mistakenly argue that *Fulmer* would permit Marshall-Silver to amend its complaint to litigate unsubstantiated claims of a separate episode. As discussed above, *see supra* note 12, plaintiffs never sought leave to amend their complaint to allege a second scheme. Thus, as in *Fulmer*, the complaint of "record reveals one isolated fraudulent scheme." 785 F.2d at 257. Moreover, the proposed second episode would involve allegations completely unrelated to and lacking in continuity with the scheme alleged in the complaint. Thus, even the "offered" amendment would fail as a matter of law. *See Mendel*, 835 F.2d at 67 n.5.

[28] *See, e.g., United States v. Kragness*, 830 F.2d 842, 851 (8th Cir. 1987) (multiple drug importation schemes satisfies pattern requirement); *Ornest v. Delaware North Companies, Inc.*, 818 F.2d 651 (8th Cir. 1987) (defrauding plaintiffs of commissions not pattern); *Holmberg v. Morrisette*, 800 F.2d 205, 209-10 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 1953 (1987) (acts taken to draw down three letters of credit one scheme and not a pattern).

therefore, because this case fails to focus any conflict among the courts of appeals.[29]

CONCLUSION

Plaintiffs' petition does not raise any questions that require this Court to settle. The Court below correctly applied the RICO statute to the facts before it. Further, there is a consensus emerging among the courts of appeals analyzing pattern on a case-by-case factual inquiry of many factors to determine continuity plus relationship. Moreover, this case is ill-suited for addressing the question of "pattern" under RICO because plaintiffs' allegations of a single victim, a single injury, and a single short-lived scheme with a single active perpetrator would not establish a pattern under the standards of any of the courts of appeals.

Thus, Respondents respectfully request that the Writ be denied.

Respectfully submitted,

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[29] The defective allegations of pattern is only one of the deficiences of the RICO allegations raised below by defendants. In addition, the complaint failed to allege a proper enterprise and did not plead actionable racketeering activity. Although these deficiencies were not addressed by the Court of Appeals, they provide independent bases for affirming the dismissal of the complaint. Thus, the Writ also should be denied because the Court need not reach the question of pattern to affirm the judgment of the Court of Appeals.